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No. 77-214

In the
Supreme Court of the United States
October Term, 1977

C. CLYDE ATKINS, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION AND PETITIONERS' REPLY BRIEF

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MOTION FOR LEAVE TO FILE REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request leave of the Court to file a four page Reply to the Brief for the United States in Opposition to the Petition for Certiorari. A copy of the reply sought to be filed is attached to this motion.

In support of this Motion, Petitioners respectfully state that this case presents issues which the Government agrees are of the utmost constitutional import, including a challenge to a statutory scheme which the Respondent likewise agrees is unconstitutional. The Government resists Certiorari, however, contending in part that this Court's opin-

ion would be "largely advisory". The attached Reply demonstrates why a decision on the issues is essential and would not be advisory.

Respectfully submitted,

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KEVIN M. FORDE
Attorneys for Petitioners

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PETITIONER S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

In its Brief in Opposition (hereinafter referred to as "Govt. Bf."), the Government agrees with Petitioners that the legislative veto is unconstitutional and that "a clear judicial resolution of the constitutional issue is of the utmost importance." (Govt. Br., p. 15-16). It also admits the urgency of the situation, stating (1) that the "statute at issue here and similar provisions have substantially encroached upon the constitutional functions of the President, and in many cases of the judiciary as well, in violation of the separation of powers inherent in Articles I, II, and III". (Govt. Br., p. 17), and (2) that the "decision below is the only decision to date that squarely reaches the issue." (Govt. Br., p. 16, n. 13).

The Government takes the position, however, that "notwithstanding the importance of the issue", this Court should not grant the instant Petition because, in the Government's view, the one-house veto provision under consideration is not severable from the remainder of the Postal Revenue and Federal Salary Act of 1967 and, secondly, because a recent amendment to that statute (which did no more than change the form of the legislative veto contained therein), has rendered any further decision in this cause "largely advisory".

Petitioners respectfully submit that the Government is in error in both respects. The question of the provision's severability has been addressed fully in the Petition for Writ of Certiorari (pp. 17-20) and in the Supplement thereto. As we have noted (Petition, p. 17, n. 30), none of the three Opinions comprising the Court of Claims' decision herein embraced or otherwise relied upon the view that the legislative veto, contained in a single sub-paragraph of the lengthy and comprehensive Postal Revenue and Federal Salary Act of 1967, could not be severed from the remainder of that Act. The Government nevertheless persists in its contention that the provision in question is neither constitutional nor severable, demonstrating an apparent willingness to accept the inevitable and devastating consequences which would accompany voiding the entire statute, *i.e.*, making every salary payment to every judge and other federal employee, paid under the Act since 1969, unlawful. (See, Petition, p. 17, n.30). It was this possibility which led the three dissenting Court of Claims' judges to characterize the argument against severability as "patently ludicrous." (The remaining members of that Court did not even address the issue.)

It should further be noted that the Government's arguments against granting the Petition implicitly contradict one another, for if the amended statute indeed has "repealed" the legislative veto contained therein, while leaving the remainder of the statute in full force and effect (as the Government contends) it follows quite obviously that Congress *would* have "enacted those provisions [of the Act] which are within its power, independently of that which is not. . . ." *Champlin Refining Co.* v. *Corporation Commission,* 286 U.S. 210, 234 (1932). It is respectfully submitted that the traditional criteria for determining the severability of a statutory provision are satisfied fully in this case.

AN OPINION IN THIS CASE WOULD NOT BE "LARGELY ADVISORY".

The Government has accurately stressed the growing importance of the constitutional issue presented.[1] Indeed, as recently as November 5, 1977, President Carter vetoed The Department of Energy Authorization Act of 1978 (S. 1811) because, *inter alia,* "[i]t limits the constitutional authority of the President through three one-House veto provisions." (See, 13 Weekly Comp. of Pres. Docs., p. 1726, and Gov't. Bf., p. 16, n. 12). Yet, having ably demonstrated the unconstitutionality of the legislative veto in general, and the urgent need for a constitutional determination on the issue, the Government then suggests that the Court should avoid resolving that issue in this case because here it "has no prospective importance", and any opinion by this Court would be "largely advisory" [Gov't. Bf., p. 20]. To support this contention, the Government argues that the one-house veto provision at issue was "repealed" earlier this year.

Petitioners respectfully submit that the alterations in statutory scheme reflected in the revised statute do not moot the issue in this case. First, Petitioners are seeking money damages based upon action by the Senate taken

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[1] As noted in the Petition (p. 11), Congress introduced 244 such Bills in 1974 and 1975 alone.

pursuant to an admittedly unconstitutional statutory provision. For this reason alone, no change in the statutory scheme diminishes the strength or viability of Petitioners' claims. Second, and more importantly, the change in the statute (discussed in the Petition at p. 15, n. 27) has not cured the basic constitutional defect. It has only added a new twist to an admittedly unconstitutional scheme. Now, instead of requiring that one house of Congress act affirmatively (by passing a resolution) to void the lawful exercise of executive authority, either house of Congress is impowered to do so by *inaction*. If a majority of either house of the Legislative Branch declines to place its stamp of approval upon the President's decision, the lawful exercise of Executive authority is effectively "vetoed". In terms of "the basic principals of bicameralism and the presidential role in legislation" established by Article I, Sections 1 and 7 (Gov't. Bf., p. 15), the crucial constitutional issue remains. Indeed the Government admits as much, identifying the veto provision in question as "one of a large number of similar provisions in federal legislation that purport to give *both* Houses, *one* House, or committees thereof, veto power over actions lawfully taken by the President pursuant to statute." (Gov't Bf., p. 13; emphasis added).

Petitioners respectfully submit that the Government's Brief In Opposition is a study in contradiction. While recognizing that "a clear resolution of the constitutional issue is of the utmost importance" (Gov't Bf., pp. 15-16), the Government seeks to avoid a resolution of the issue in this instance, notwithstanding the fact that the decision below is "the only decision to date that squarely reaches the issue". [Gov't Bf. p. 16, n. 13]. Petitioners respectfully submit that this case presents an opportunity to decide this "constitutional issue of utmost importance"; it may well be the only case providing such an opportunity.

As Senator Dirksen noted, in deploring the use of legislative vetoes:

> Those provisions were unconstitutional then and they are unconstitutional now. It is true that there has been no pronouncement to that effect by the Supreme Court of the United States or by any other competent Federal court. *The reason that it is difficult to test the legality of such statutes is found in the fact that, in order for the matter to be presented to the courts, somebody must have standing to challenge its validity.* However, that fact does not make it constitutional . . . . 100 Cong. Rec. 5095 (1954). [Emphasis added.]

CONCLUSION

In its Brief, the Government has submitted no sound reason for opposing the Writ and avoiding the ultimate resolution of this compelling constitutional question. Petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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